

MINUTES

PLANNING COMMITTEE

August 10, 2011

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Nadine K. Nakamura, Chair, at the Council Chambers, 3371-A Wilcox Road, Līhu'e, Kaua'i, on Wednesday, August 10, 2011, at 9:35 a.m., after which the following members answered the call of the roll:

Honorable Tim Bynum
Honorable Dickie Chang
Honorable KipuKai Kualii
Honorable Nadine K. Nakamura
Honorable Mel Rapozo
Honorable JoAnn A. Yukimura
Honorable Jay Furfaro

There being no objections, the rules were suspended to take public testimony.

There being no one present to give testimony at this time, the meeting was recessed at 9:35 a.m..

The Committee reconvened at 9:36 a.m., and proceeded as follows:

Bill No. 2410 A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8, KAUA'I COUNTY CODE, 1987, AS AMENDED, RELATING TO THE PERMITTING PROCESS FOR TRANSIENT ACCOMMODATION UNITS
[This item was deferred.]

Chair Nakamura: Today we would like to start off with a presentation from the Planning Department to explain Bill No. 2410 and we have Director Mike Dahilig and Marie Williams who have a PowerPoint presentation.

There being no objections, the rules were suspended.

MICHAEL DAHILIG, DIRECTOR OF PLANNING: Good morning Chair, members of the Council, Mike Dahilig, Director of Planning. We have prepared for you a PowerPoint presentation on Bill No. 2410 as it relates to implementing Section 3.19 of the Kaua'i County Charter with respect to transient accommodations. Marie Williams will be providing the presentation on behalf of the department and before she starts I just wanted to publicly thank her for her work, as well as Ian Jung's work on this matter, because it is a pretty complex Bill and it's a pretty complex issue. They have spent a lot of sweat equity on this so I just wanted to thank them.

MARIE WILLIAMS, PLANNER: Good morning Councilmembers, Chair Furfaro and Committee Chair Nakamura. We are here today to go over draft Bill No. 2410. Today I'll be discussing the background of the Bill as well as the original draft Bill 2386 and go into the components of 2410 and then look at some potential growth scenarios as well.

Let's start with the General Plan since it is the basis for Charter amendment Section 3.19 which we are trying to implement through this Bill. Charter Section 14.06 describes what our General Plan is and I won't read the whole section

but in summary the General Plan is a policy document that shall guide all Council action concerning land use, development, urban renewable programs and capital improvements.

When it comes to the General Plan's policy regarding resort development, we need to turn to section 4.2.8.1 of the General Plan and the policy is very clear, it reads that we will encourage and support resort development on lands planned and zoned for resort use, primarily at Princeville, Kapa'a-Wailua, and Po'ipū which are our visitor destination areas, the VDA. And as for implementing actions, there were none listed in this section. The Charter amendment also refers to what is called the Planning Growth Range of the General Plan which is a set of four (4) different projections for our resident population, our visitor population, our total population which is the sum of our resident and visitor populations and then total jobs as well. I just want to be clear that our General Plan is pretty explicit about what these projections are meant to be for and it states that the Kāua'i 2020 projections are not intended to be targets or limits for growth. They are intended to be guideposts against which to measure actual growth and impacts.

Now let's get into the history of Charter section 3.19. In 2008, the coalition for responsible government, they got enough signatures for the Charter amendment petition and they also had a media campaign and what you see there is one of their ads from the Garden Island Newspaper. That election in 2008, the Charter amendment successfully passed with fifty-one percent (51%) of the vote and then in the intervening years the implementation options provided by what is now Charter amendment section 3.19 were studied. And then last year in November, Council referred draft Bill 2386 to the Planning Commission. This year Planning Commission has been working on draft Bill 2386, our first public hearing and staff report was presented in February. On February 22, the Planning Commission held an informational workshop and panel discussion and was continued by the public hearing on March 22, then on May 24 the Planning Commission recommended approval with the Planning Department's amendments to draft Bill 2386 which is now currently draft Bill 2410. This is what the original draft Bill looks like and I'll briefly touch on it but it, that is proposed a permitting growth rate cap on transient accommodation units and I'll just call them TAUs from now. By requiring applicants to obtain a TAU certificate, the number of available certificates would be one point five percent (1.5%) of baseline that counted not only our existing TAU inventory, but TAU lots or potential TAUs as well. The yearly lottery would allocate TAU certificates that would be held at the Planning Commission.

The bill in its current form looks like this and it is a little complex. So I will take you through the process and also show you why certain changes were made. The main components I want to focus on is the definition of "TAU," the requirements for applicability and exemptions, and then how we're going to determine our availability of certificates and then the allocation process, as well. So one (1) of the first things we had to do was to define what a "TAU" is. This meant reconciling the definition for "TAU" in the Charter amendment, and what the definition is in our CZO. There are many types of TAUs, from hotels, to apartments vacation rentals. This definition includes them all, without including a second home in the VDA or long-term rental, which should not be considered TAUs and that was a problem with the original draft Bill 2386. And for the ease of accounting, in the current Bill we define the "transient accommodation unit inventory" as the State visitor plan inventory, which is the official census of resort development for Hawai'i. So what permits now apply to this growth rate cap? Section 8-28.2 of the draft Bill outlined the applicability requirements and these are really based on Charter section 3.19, Section (a). Applicable are zoning use

variances and subdivision approvals that would allow the development of more than one (1) TAU on the lot, that is entitled to more than one plumbing unit. The original draft Bill simply tied the growth rate cap to permits for more than one (1) TAU, which would have created a loophole where applicants might develop several TAUs on a single lot by coming in for a permit for a single TAU one (1) at a time. We wanted to prevent that from happening, which is why the full TAU potential of the lot will be examined. And to illustrate this point, here are some examples, say an applicant wants to subdivide a parcel within the VDA that has density for ten (10) TAUs. Yes, they apply, because obviously the parcel they are seeking subdivision approval has ten (10) potential TAUs. Example number two (2), an applicant wants to build a TVR on the parcel within the VDA but there is also the potential for an additional dwelling unit that might be used for a TVR. Under the Bill, that would apply, because there are two (2) TAUs that could be added. And then finally, somebody wants to build a multi-family building outside of the VDA, because it's outside the VDA and it will not be used for resort purposes, we know it won't apply and therefore, we wouldn't subject them to the requirements of the bill.

Before we get into exemptions, let's under the difference between exempt projects and non-applicable projects. There are projects that already received all their permits from the planning department, but may not be constructed yet and these projects do not apply to the growth rate cap, because we cannot make them come back to the Planning Department to get another applicable permit. We can't make them get another zoning permit, for example. And here are two (2)... therefore, they don't have to come in and apply for an exemption. Here are two (2) examples, say there is a lot that was part of a subdivision, prior to December 4, 2008 and it's located within the VDA and the lot is restricted to one (1) home. Well, even though they will be developing a TAU, you can see that we know that the permit will not be for more than one (1) TAU and therefore, it is not apply. They do not need a TAU certificate. The second example there is an apartment/hotel that has no building permits, but they received their final class four (4) zoning permit from the Planning Commission before the effective date of Charter amendment section 3.19. They did not need another applicable permit and can move forward pursuant to the conditions of their existing class four (4) permit and therefore they wouldn't have to come in and apply for an exemption.

So what are the exemption requirements? Well, I just want to be clear there was no guidance provided on this matter in Charter section 3.19. So we really had to rely on our County Attorney's Office to develop language that was fair and defensible, as well. The current draft Bill recognizes development projects that have begun construction and have fulfilled or started to fulfill conditions of their zoning approvals. This is what the process would look like, that first of all they have to be an existing resort project and would need VDA ordinance under a zoning to be approved before the effective date of Charter section 3.19. They would have had to complete improvements pursuant to the VDA or zoning ordinance and then they will have to prove that substantial sums were spent, and then they will have to take the initiative to apply to the Planning Director within one (1) year of the ordinance. That is the window and then it will close. That is how somebody could successfully be exempt from the growth rate cap.

There are two (2) key definitions in our exemption requirements and the first is an existing resort project. To be an existing resort project, it means one (1) or more parcels that were approved and established prior to December 5, 2008, pursuant to an ordinance and located in zoning districts that were also approved and established prior to December 5, 2008. The other key definition is "substantial sum," and defines this as an amount including cost associated with architectural

and engineering and professional services but not for planning and permitting, exceeding twenty percent (20%) of the real property assessment of the land value for the entire existing resort project for the 2008-2009 tax years as determined by our Department of Finance. Again, this is something that the County Attorney's Office spent a lot of time working on with us. Now moving on how we will determine how many TAU certificates are available prospectively. If you remember the flow chart and on January 31 of the first year of our allocation cycle, the Planning Commission would adopt a number of TAU certificates that are available for perspective clients for the next five (5) years. Let's call the number (n) and (n) would be determined by taking our TAU inventory in the base year, which is simply the year prior to the start of the cycle, and multiplying that by seven point seven, three percent (7.73%), which is one point five percent (1.5%) compounded over five (5) years. Although this wouldn't apply to our first cycle and future cycles we would add to this number any lapse or unallocated certificates from the previous cycles. And moreover, if we have excess growth and I will get into that in a moment we'll take up to twenty percent (20%) of this number and use it to account for the excess growth and let me get into that right now. First of all, let's try to understand why there might be excess growth. Well, excess growth will really be any inventory growth between two (2) base years beyond what is equivalent to the one point five percent (1.5%) annual rate of growth and this will come from our backlog of non-applicable and exempt projects. It could come from TVR registrations, from other permits that might not apply, such as maybe a conservation district use permit, or even a project on land, not under the county jurisdiction like the Department of Hawaiian Homelands, for example.

How will we deal with the excess growth if it comes about? We're proposing that we allocate up to twenty percent (20%) of the available certificates to account for this. This is what it would look like. Here is our first cycle in the green and (b) is the base year. And the yellow triangle represents our TAU certificate allocation. Let's say when we come to our next cycle and we look at the new base year, and we find that actual growth has exceeded what was equivalent to one point five percent (1.5%) average annual growth over that period, which is represented in the orange box, that's the excess growth. We are proposing that we do something with the perspective allocation and I will show you what that is. Here is the excess growth and the blue boxes represent our new cycle and again, the yellow is our allocation of certificates. We will take a portion of the available certificates up to twenty percent (20%), and use it to apply to our excess growth and we will keep doing that until we pay down this excess growth, so to speak. And then only eighty percent (80%) of what would otherwise be available to applicants will be available. So now that you understand the components of the process, let me go over it. First of all, I want to explain why we're going with the five (5) year allocation cycle. This was a recommendation from the Planning Commission where they weren't too happy with the idea of having to conduct an annual lottery and have to entertain having to aggregate for a single applicant. It seems like something that would be confusing and not necessarily fair as well. So the thought of going to a five (5) year cycle means that the Planning Commission would only have to deal with the issue of certificates and allocating them once every five (5) years. It would sort of be the better way to administer a program such as this. Also remove the luck factor of a lottery, as you see in the cycle that after Commission adopts the number of TAU certificates that would be available, then we would allow applications for use permits, zoning permits, variances and subdivision approvals for more than one TAU to come in and they could get also their TAU certificate. And these requests would be accepted on a first come first served basis. Now that I described how the system works, let's look at long-term impact of the system. To do so, we have to first understand our backlog of units that either do not apply or might be exempt from

the program. Based on our records we estimate that there are approximately four thousand six hundred and fifty (4,650) potential TAUs that are either not applicable or might qualify as an existing resort project, and thus apply for an exemption. Here is a list of some of the projects and the TAUs that are permitted through the permit shown there. To illustrate this sense, I know that it's sometimes easier to see them on the map, here is our Princeville VDA and you see the three (3) projects there that are potential projects. And east Kaua'i as well and finally our Po'ipū visitor destination area. You can see that this is where most of our potential growth will be, there are a lot of projects in this area.

Now let's go through some scenarios, and first let's look at what I call "the perfect world" scenario because this is where our inventory growth equals our permitting rate, which would be the case if we started from scratch. If we had started this program say forty (40) years ago, for example. What it would look like is that we take an allocation cycle and determine how many certificates are available and at the end of the cycle we find that growth has been exactly what is equal to our permitting rate. We move forward and under this scenario, our draft TAU certificate allocation program works perfectly, of course. We just move forward that way. And then I also wanted to present a low-growth scenario because that is where we are in, our inventory growth has been pretty stagnant over the past years and we would take our cycle and again develop the number of TAU certificates that we can allocate. Then when we come to the next base year, we find our inventory growth has gone below what was the permitting rate. You can see the gap there. We just move forward using the actual inventory as our new base year. And the allocation would be slightly smaller. Now this is our rapid-growth scenario and there are many assumptions that you have to make with this. One (1) assumption is if we assume that say fifty percent (50%) of our backlog comes on line in five (5) years, which has never happened before, but you know, we're just going to take an extreme scenario to illustrate what this proposed program would look like. So between our first base year and our second base year, we find that growth has been very high. The orange box represents the inventory growth. Again, when we're developing our prospective TAU certificate allocation for the next cycle, we would immediately implement our system where we reduce the future allocation by twenty percent (20%), use that twenty percent (20%) to start paying off the excess growth, and then allowing only eighty percent (80%) of what would otherwise be available for prospective applicants. We would just have to keep doing this until the entire orange box is dealt with. Depending on how rapid the growth is, it could take a few cycles to get through that.

In summary, we feel that 2410 really does accomplish two (2) important things. First of all, it provides a system to deal with growth driven by our backlog of permitted and exempt projects and then it helps us to move forward as well and avoid a moratorium and provide at least some TAU certificates to prospective applicants over the next several cycles. That is the end of the presentation. Thank you.

Chair Nakamura: Thank you Mike and Marie, Ian Jung and Planning Commission for all of the work and thought to get us to this point. We know that the Planning Commission held several workshops, there was a lot of input along the way and this is still a work in progress but I wanted to thank you for getting us to this point. What I wanted to do now is to open up for questions from the Councilmembers and then once we get through that process, then I wanted to open it up for public testimony.

Mr. Rapozo: I just have one (1) question. On your rapid growth scenario, you talk about fifty percent (50%) of backlog comes online in five (5) years, do we know what that rate is right now? The actual projects coming online versus our inventory or measured against, let's say if we have forty-six hundred, obviously ten percent (10%) would be four hundred sixty (460), five percent (5%) would be two hundred thirty (230). So do we know that number? What percentage of projects, today, actually becomes reality annually off of the inventory number?

Ms. Williams: Historically our visitor plan inventory growth rate has run from about on average is between two point five (2.5) to three percent (3%), but over the past few years because much of this growth is driven by the market, it has slowed down. But then if there's another... if the market suddenly becomes very busy again, some of these projects that do have entitlements could come online pretty rapidly but right now from... it looks like growth is slow and will continue to be slow.

Mr. Rapozo: Well yeah according to the morning news this morning, it's going to be slow but I think fifty percent (50%), is that a realistic number? I guess my concern is the people watching this right now look at fifty percent (50%) and say wow it could be really horrible but really what's the possibility of twenty-three hundred (2,300) units coming to fruition in the next five (5) years, I think that is the question. I kind of wanted to look at what's the realistic expectation for me as a Councilmember who's got to analyze this, really what should I be looking at and maybe it's for an economist to answer but I just think fifty percent (50%) is a stretch and I understand, I think you mentioned that but is it about two percent (2%) right now? How many projects came into fruition in the last year and what we anticipate in the next year? I guess is really what I'm trying to figure out.

Ms. Williams: You're right. That was the absolute worst case scenario and we know it's not realistic. But at the same time we wanted to provide a scenario because we just wanted to show how our program would work if something that has never happened before, did happen. Realistically there is a lot of movement in our inventory. Last year we saw in our inventory, we saw quite a few projects leave our inventory as well and because so much of Kaua'i's visitor inventory are Time Shares and TVRs and what happens with those, you know it can change every single year. It's hard to predict. If our inventory was all hotels, it would be quite simple because those are stable but we might have to do a little bit more of an analysis on that to determine a realistic number on what will come online in the next few years.

Mr. Rapozo: Two (2) to three percent (3%) is probably a fair estimate?

Ms. Williams: Yeah, that's been our historic rate over the past, since 1960.

Mr. Rapozo: Okay. Thank you very much and that was a great presentation. I think for the lay person, it was easy to follow. Thank you.

Chair Nakamura: Just as a follow up to your question Councilmember Rapozo, were you looking at the number of building permits approved over the past year or planning permits? I don't think there were any planning permits approved over the past year. I'm not sure whether there were any

building permits issued for transient accommodation units and that information we should be able to get.

Mr. Rapozo: I'm actually looking at how many units are we turning, how many units are we producing, not permitting... but actually... as the list that you showed, we've got quite a few projects that may never get built.

Chair Nakamura: Right.

Mr. Rapozo: It just may never get built, I think Coco Palms is one of them, I'm wondering if that will ever happen but that ties up three hundred three (303) units of inventory. My question is, out of the forty-six hundred units that have been so called in the inventory, how many we anticipate actually opening the doors, is what I'm saying. Because I think if you look at some of these projects even some of the projects that are actively moving, even if the economy turned around tomorrow morning and everything went, all of a sudden everything bad went good, some of the bigger projects still would take fifteen (15), twenty (20) years to completely build out. I think that's what we got to understand is that it's not that simple to turn these projects around and some of them, like I said to reach that build out, will be twenty (20), twenty-five (25) years so that's kind of the direction I'm heading, I want to know what that number is because a permit is a permit. A permit doesn't affect traffic, a permit doesn't affect an infrastructure, it's when that permit gets actually active and the building is there and the units become available and I'm thinking that's kind of the number I'm really more interested in as we move forward.

Chair Nakamura: So maybe occupancy permits for transient accommodations?

Mr. Dahilig: It's something we can delve in further with the Building Division to check the number of COs that maybe were triggered as a consequence of our permits and maybe we can try to get that number for you.

Chair Nakamura: We're also hearing that market absorption rates are low with some projects. One (1) project being sold or one (1) unit being sold in one (1) year.

Mr. Dahilig: Anecdotally we have heard of market absorption being as low as one (1) a year and that's not mentioning who that is but it is from a financial standpoint which we don't really get into, but anecdotally we can look at from trying to answer Councilmember Rapozo types of questions that are on the head in terms of where we were looking at. What is the realistic build out of this four thousand something unit backlog and it's really a two function test essentially? When we get tickles from developers from a permitting standpoint, regardless of whether the economy is good or bad, there's always going to be inquiries that come in and they usually use this period of time to take care of all the entitlements so that once the capital flushes into the market, they're going to essentially pull the building permits and get their certificate of occupancy. As Marie mentioned the historical average is two point five (2.5) to three percent (3%) however we're in usual times with market capitalization and whether developers can actually get the capital to go vertical on the projects. What we'll do is take a look at COs and see if whether COs have been given for these types of... for what's on our list.

Chair Nakamura: Any other questions Councilmember Rapozo?

Mr. Rapozo: That's all I have.

Chair Nakamura: Anyone else? Chair Furfaro.

Mr. Furfaro: I can wait because I'm not a member of your Committee.

Chair Nakamura: Sure.

Mr. Furfaro: Marie, for the purpose of not confusing the public here on the vote, you should point out that the fifty-one percent (51%) vote that you have here, was actually fifty-one point two percent (51.2%) of the potential votes. Because there was the possibility of twenty-seven thousand five hundred and ten people casting a ballot but five thousand five hundred (5,500) chose not to vote either way, so your fifty-one percent (51%) reflects fifty-one percent (51%) of the potential votes. The media has been reporting as well as the Charter Association that it passed by sixty-four point one percent (64.1%) and that is correct for actual votes cast. But your fifty-one percent (51%) represents only fifty-one percent (51%) of the potential votes. Are you following me there?

Ms. Williams: Yes. Thank you for clarifying that.

Mr. Furfaro: Thank you.

Chair Nakamura: Thank you. Any other questions?

Ms. Yukimura: Yes.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Thank you. Marie and Mike that was an excellent presentation, very clear, thank you very much. Just a couple of preliminary questions, we're using as a basis of existing the State planned inventory, DBEDT's inventory, and that's proven to be fairly accurate right?

Ms. Williams: Yes. I'll just tell you a little bit about it, it's something they've been doing on an annual basis since I think 1960 and they actually every year consult not only the trade industries, the hotel association, the Time Share Association but they contact all the Counties Planning Departments as well and actually send out surveys, they contact the properties. Recently they've been adding an internet search into their efforts as well, so it's an exhaustive effort and we feel that it's the most accurate that there is.

Ms. Yukimura: That's excellent to use something that's existing and accurate. In terms of your criteria for exempt properties, is there a possibility of putting that on the screen again without turning off the lights? And while we're at it, I mean the exempt you said include the existing, they include those with VDA and zoning before 2008 and then completed improvements, is there a timeframe on that? Does the improvements have to be completed before they apply or before 2008 deadline?

Ms. Williams: Yes I believe the substantial sums have to be spent before 2008, December 5, 2008.

Ms. Yukimura: Okay and the previous criteria which were completed... okay they're actually the same right? One, they have to have completed improvements and two (2), that has to have resulted in an expenditure that's twenty percent (20%) of the real property in the amount, at least twenty percent (20%) of the real property assessment, is that right?

Ms. Williams: Yes.

Ms. Yukimura: Can you explain how you came to that criteria?

Mr. Dahilig: The twenty percent (20%) number is based on, when we took a look at cases that involved investment backed expectations and substantial sums and the vesting of rights, the numbers are all over the place. There isn't a threshold that says (x) amount is what you need in order to vest but given the need to put this into some type of Legislation and understanding and taking a look at generally where these amounts that were spent by, we proposed a number of twenty percent (20%) as being a conservative number. Some actions for example have been as low as a couple a hundred thousand dollars on Engineering and Architectural fees that a Judge has found vest to a permit. Keeping that in mind but at the same time wanting to make sure that we propose something conservative, we thought the twenty percent (20%) would be a realistic threshold for expenditures.

Ms. Nakamura: Okay, thank you. And then your last requirement which is applied to the Planning Director within one (1) year of the ordinance, that's for the first five (5) year allocation, is that... oh wait excuse me, this is not an allocation, this is to be exempt.

Ms. Williams: This is to be exempt from the entire certificate allocation program.

Ms. Yukimura: Right.

Ms. Williams: And that's the only window we're providing for that exemption. It closes completely forever upon one (1) year.

Ms. Yukimura: Okay, good. Is there an appeal process to that?

Ms. Williams: Yes they can appeal to the Planning Commission if they are...

Ms. Yukimura: Because that's going to be a Director decision?

Ms. Williams: Yes.

Ms. Yukimura: Okay. On the allocation, you're talking about the request for certificates being on the first come first serve basis, is that correct?

Ms. Williams: That's correct.

Ms. Yukimura: Okay, are there any criteria of readiness?

Ms. Williams: Yes, they have to... when they submit a request for a TAU certificate, it has to be accompanied with a complete application for the zoning use subdivision or variance and moreover once a TAU certificate is issued to the applicant, it will lapse after a period of four (4) years so they have to be ready, not only to apply but also to build within... on the next four (4) years once they get their approval.

Mr. Dahilig: I just want to add that the reason for these time limits is an attempt to prevent people from squatting on certificates.

Ms. Yukimura: Yes.

Mr. Dahilig: From a market standpoint you can squat on seven hundred something certificates and no one can get it and decide not to build for three (3) years and so that's why this mechanism is in place.

Ms. Yukimura: That's excellent that you thought that part out and you know it reflects on what Councilmember Rapozo was concerned about, in terms of Coco Palms having an allocation of so many units and then nothing happening for years which would be wrong to the development community which is ready to build. My last question is in the General Plan which is the basis of all of this, we're presuming that the impacts of growth in terms of infrastructure have been thought through, so we're all saying okay we want to achieve these goals and it'll be great if we achieve these goals but I'm concerned as part of the planning process as if we do achieve these levels of growth then what happens to our roads and our sewers and our water and sometimes they become limitations of growth as well and the whole purpose of the General Plan was to coordinate that relationship. Where are we on that in terms of this growth that we are projecting if it happens?

Mr. Dahilig: Let me see if I can answer it this way... when the process starts, the certificate allocation is only held in abeyance until the subdivision approval or the variance or the zoning permit is actually approved. Usually through that entitlement process through one of those four (4) approvals, we already at that point can start levying actions. We do that as a matter of consistency of the General Plan whether if there is projecting growth and there's a need to expand the road or expand the bikepath at a certain area that we can include that as part of the permitting process if this is a TAU type of resort or expansion of a school or as you know an implementation of the housing requirements. That comes as a consequence of the permitting approval and so as we do with every permit, we look for consistency with the General Plan and we look at it on a multilayer basis with respect to social economic issues as well as connectivity issues and those types of things.

Ms. Yukimura: Okay but if you don't have a really good plan for transportation islandwide then how do you identify what the requirements are for someone who wants to grow?

Mr. Dahilig: As we embark on the next General Plan process, we're cognizant of the changing demands for different types of connectivity and different types of approaches for infrastructure. As part of we're studying is taking a look at three (3) technical studies that will help lay the foundation for eventual General Plan. As well as our intent to try to partner and cooperate as much with the Transportation Agency's plan that they are embarking right now with Jim Charlier and those types of approaches or policy recommendations that

will come as a consequence of the Transportation Agency plan will naturally flow into the General Plan once it starts and we do that as a matter of consistency. Because it wouldn't make sense for us to have separated Transportation plan as part of the General Plan and yet we're approving on the other side of the County another plan.

Ms. Yukimura: Okay, so what about the exempt growth? We're assured that there is sufficient infrastructure for that exempt growth?

Mr. Dahilig: The exempt growth is a consequence of and I can only speak anecdotally because not knowing specifically which each and every permit that has exactions and what was levied by the County to accommodate for more demand on the infrastructure but usually as a consequence of the permitting process, the necessary infrastructure to accommodate three hundred (300) TAUs as coming online for project (x) would have been offset by demands on the developer to widen roads or contribute to expanding the sewer treatment plant, etc... I can't speak to specific instances but usually that is the process that these exempt projects have gone through already with respect to approvals and that judgment was made back in before 2008.

Ms. Yukimura: Okay well that's the end of my questions. I just want to say that I can say that the exempt growth never took, there were never conditions about the main highway system of the island and so there's a big gap of what we've approved and what the Transportation consequences of that are. Thank you very much.

Chair Nakamura: Councilmember Bynum.

Mr. Bynum: Good morning. I also want to focus on the exemption requirements and so on this chart here it's this and this and this... all of these elements have to be met?

Ms. Williams: That's correct.

Mr. Bynum: And what is the last discretionary permit?

Ms. Williams: It's usually is the class four (4) zoning permit but it's usually applied for a bundle where they might get several other necessary permits...

Mr. Bynum: And so in your chart where it says class four (4) on those projects, that's often the last discretionary permit?

Ms. Williams: Yes.

Mr. Bynum: So you have to have the last discretionary permit and demonstrate substantial sum?

Ms. Williams: No. I will go back to the slide that and it's confusing but to distinguish between what is exempt and non-applicable you can see here that if a project doesn't require another discretionary permit, they therefore don't need to apply for an exemption. They can move forward pursuant to the conditions of their permit. It's only when a project still needs one of these applicable permits that they would have to apply to be exempt from this certificate allocation program.

Mr. Bynum: And that's the answer I wanted to hear. And so it really is this scenario or this scenario, not hand... and that's a very significant difference yeah?

Ms. Williams: Yes.

Mr. Bynum: Have I got that right?

Ms. Williams: Yeah I...

Mr. Dahilig: I guess when we looked at the exemption, okay, when we looked at the gamut of projects that are out there and we determine whether they are vested or not, there are two (2) elements that we look at. One (1) is the last discretionary rule, which is something that Hawai'i abides by with respect to entitlements and then there's the investment backed expectations rule, which follows along the lines of zoning estoppels and inequity. When we look at the class four (4) permits, the class four (4) permits are an indicator that they run the gamut through the approvals and they finally gotten their last approval. As far as our understanding, under Hawai'i State law, that is it, that's all they need to vest their rights.

Mr. Bynum: Right.

Mr. Dahilig: But on the other hand, there are approvals that midstream require expenditures and if those expenditures happen as a consequence of a midstream approval but yet they haven't achieved their class four (4) approval yet, that's when we get into this realm of investment backed expectations and expenditures of substantial sums. That addresses the other elements and so Councilmember, there's two (2) ways to get to the apple but you don't need both.

Mr. Bynum: Right. And I wanted that clarification because it would appear that you have to do both and depending on the individual circumstances and so I want to focus on that with my follow up questions because you have a chart here. The chart shows many of these have the class four (4) zoning and that's pretty clear, that's pretty cut and dry, you either have the permit or you don't. If you're accurate that the Hawai'i legal criteria is if you have the last discretionary permit, you've met the criteria and we don't have any legal justification to limit or even pace that growth, right?

Mr. Dahilig: Well I do want to add two (2) caveats to that. The first one (1) is that these class four (4) zoning permits were approved with the understanding that certain exactions were going to be given.

Mr. Bynum: That's my next question, so go ahead.

Mr. Dahilig: And then also that there's a certain characteristic to the property. If the project strays outside of what they were permitted for originally, then we have to make a call whether it's enough of a change to require a new permit.

Mr. Bynum: Right.

Mr. Dahilig: And that comes with the consequence of the department's review if they want to come in and either change the footprints, change the entry way, change the density, etc..., so that's one thing. The second thing is that some of these projects have had their SMA permit lapse and so if the SMA permit does lapse, they're still under State law are required to come in and request another SMA permit and it's really a consequence of the permits generally having a two (2) year expiration date unless otherwise stated. That can come into the process and because the 205(a) special management area requirements are a layer of what our County permitting requirements are, there will be an evaluation of whether it needs a form, if there's views that are obstructed, access to the shoreline, these types of things... those things could come into play as a consequence of the SMA permitting process on top of the class four (4) zoning permit process. So that could change the character of a project as well.

Mr. Bynum: So I want to get a little bit systematic about your answer because you anticipated where I was going with this. If there's a class four (4) zoning permit, the legal interpretation is that under Hawai'i decisions, it meets the criteria, we don't have the legal authority to say no or to limit or even pace when that development occurs because the County has said, hey you meet these conditions, you're good to go, right?

Mr. Dahilig: I can't make an opinion on that but what I can say is that generally that is the rule of thumb from a departmental standpoint we abide by.

Mr. Bynum: Right or if we adopt this ordinance that will be the criteria right? So focusing on that class four (4) zoning permits, they often have conditions?

Mr. Dahilig: Correct.

Mr. Bynum: Including performance conditions, you will build by (x) date?

Mr. Dahilig: Correct.

Mr. Bynum: Doesn't there need to be an individual analysis of each of these projects on whether they're class four (4) zoning permit, whether those conditions have been met?

Mr. Dahilig: Certainly.

Mr. Bynum: So it's possible that a project who hadn't met the conditions would lose that permit and then they would go back into the TAU program right? If they wanted to proceed.

Mr. Dahilig: It is possible, yes but I guess I would... maybe... if there's particular legal liabilities or circumstances that could cause liability with the County, maybe that question is better left vetted out by the County Attorney's Office.

Mr. Bynum: But class four (4) zoning permits have conditions?

Mr. Dahilig: Yes they do.

Mr. Bynum: And if you don't meet those conditions, what's the consequence?

Mr. Dahilig: The consequence is modification or revocation of the permit by the Planning Commission.

Mr. Bynum: In the other condition that could change that is if there was a substantial change?

Mr. Dahilig: Correct.

Mr. Bynum: If somebody says that they were going to build (x) but I want to have more units, I want to have less units or I want to not include this element or change this element, there could be a judgment from the Planning Commission that that was substantial?

Mr. Dahilig: Generally it starts at the Departmental level where we have to advise whether it's enough of a change to say that this is not the project you came in and was permitted for. Therefore from that standpoint that line of question would lead to it.

Mr. Bynum: So wouldn't there need to be a project by project analysis of whether those conditions are currently current and whether the project can proceed?

Mr. Dahilig: Certainly we can take a look at that.

Mr. Bynum: The other area is substantial investment right? And if I read this correct and I think I got it right, this Bill proposes that that standard be twenty percent (20%) of expenditures... twenty percent (20%) based on the land value in 2008, 2009?

Mr. Dahilig: Correct.

Mr. Bynum: Wouldn't it be difficult to determine what those costs were and what portion was architectural and engineering versus what part was for planning and permitting, they get pretty integrated in the process.

Mr. Dahilig: That's why the Legislation have the Planning Department essentially act as the accountant to determine okay what is an architectural plan versus what is a plan drawn up strictly for permitting requirements only. The number of Bills that could come in and there could be a range of types of expenditures that it's hard to characterize but generally when we look at architectural and engineering costs, we look at whether those cost and again I wouldn't want to be held to this should the Legislation actually pass but my thinking would be is when we look at whether these expenditures were as a consequence of actually putting infrastructure in the ground versus coming up with a primarily engineering report as part of an environmental impact statement. Those are the types of evaluations we'd have to go on a case by case basis on a bill by bill basis to determine whether it would qualify as meeting the standard in the ordinance as proposed.

Mr. Bynum: So the other substantial that I think in your testimony here, you said there's not a real clear guideline on that, there are some

cases that show pretty minimal investment and the Court ruled that that was enough. There's other Court cases where there was a lot more investment and the Court still ruled that it wasn't, it did allocate or constitute vested right, right?

Mr. Dahilig: Correct.

Mr. Bynum: You characterized the provisions in this Bill as conservative, what is that mean, conservative?

Mr. Dahilig: Conservative based on the Hawai'i cases that we know, the Hawai'i case that we know specifically there's one on the low side. We look at it from that standpoint and we're also looking at whether there was genuine investment to actually put something in the ground, putting in a planter box and I would have a hard time believing that that should vest somebody's rights for a million dollar project but we feel that twenty percent (20%) of the land value shows a serious effort that they were relying on the approvals and the exactions of the approvals and it's a number that really is a judgment call.

Mr. Bynum: I still don't understand the word conservative in that scenario, to make it easier to meet the criteria?

Mr. Dahilig: We believe it's a high threshold.

Mr. Bynum: A high threshold?

Mr. Dahilig: Yes.

Mr. Bynum: Okay. But it's possible somebody could meet that threshold with just planning and permitting costs and never had done anything physically with the property, is that correct?

Mr. Dahilig: I wouldn't want to rule out anything. I guess anything could be possible especially if you're looking at it from a 343 standpoint if they're going through a lengthy environmental impact statement process. But at that point environmental impact statement costs are speculative because here you're really only trying to say this is our environmental disclosure, this is what is going to happen and you're not really getting into a line of putting in a pipe in the ground, at those types of things. We think of planning and permitting as speculative cost whereas architectural and engineering cost or stuff that you already putting stuff in the ground.

Mr. Bynum: Yeah I got those mixed up; I said you could meet the twenty percent (20%) threshold on just the allowable architecture and engineering professional services without having physically done anything?

Mr. Dahilig: It's possible.

Mr. Bynum: It's possible?

Mr. Dahilig: It's possible.

Mr. Bynum: But you feel like that twenty percent (20%) is a high threshold?

Mr. Dahilig: It's also based, it's a high threshold and it's also based on that what we understand in some circumstances, nothing had to be put in the ground but sums were spent.

Mr. Bynum: I'm sorry?

Mr. Dahilig: Nothing was actually put in the ground but plans were drawn up to put stuff in the ground and that was enough. Again the threshold is all over, there is no bright line that we can find, there are judgments that are all over the place from a case by case basis but for the purposes of this Legislation, the bright line rule is based off of what we see out there.

Mr. Bynum: Yeah there is no bright line, I understand that but this ordinance if it passes in this form would establish that right?

Mr. Dahilig: Exactly.

Mr. Bynum: And then it would be an interruption about what costs fall into which category and you would have to rely on an individual to provide those costs to you right?

Mr. Dahilig: Right.

Mr. Bynum: And so the department would in essence do have to do an investigation of what seem logical, reasonable and make a determination and if that determination was, any appeal of that would go before the Commission?

Mr. Dahilig: That's correct.

Mr. Bynum: From either side. If you said no you haven't met this threshold, then the appeal could come from potentially from the developer or if the department's determination was oh yes they met that threshold, could that be challenged by citizens groups or others?

Mr. Dahilig: Under the rules of practice and procedure of the Planning Commission and in terms of who is entitled to actually challenge a decision of the Planning Director or the Commission, I may want to have the County Attorney provide some guidance to the Council on that. But what we look at is under the rules for revocation or modification, anybody can file. Any person can file. Whether they have the standing or not, that gets into an area that maybe is better left for the attorneys to address but any person can file.

Mr. Bynum: For me to summarize the dialogue, two (2) ways of exemption, one (1) to have the discretionary permit and the other is to spend sums of whatever criteria we determine in this bill.

Mr. Dahilig: Correct.

Mr. Bynum: And on the last discretionary permit, in my mind, you would have to make sure that that permit was still valid, and that the conditions were met and there hadn't been substantial change?

Mr. Dahilig: Yes.

Mr. Bynum: And the other side would involve the staff trying to determine whether that twenty percent (20%) threshold and any determination are subject to appeal?

Mr. Dahilig: Correct.

Mr. Bynum: Thank you very much.

Chair Nakamura: Are there any other Councilmembers with questions? Councilmember Kualii'i.

Mr. Kualii'i: Aloha and mahalo, Mike and Marie. I had a couple of questions on the PowerPoint. The slide that is on the applicability examples, right there. The second example, you talked about if there might be an ADU as a second unit, so they are applying to do a TVR, it's the first one (1) and they might have a second one (1). If they did the reverse and they applied to build a second home or a single home residence first and then they might later come and apply for a TVR, would they then not be applicable, because it's no more than one (1)? It's just the possibility of one (1), you are not getting to the possibility of two (2).

Mr. Dahilig: When an applicant comes before the Planning Department for a class one (1) permit, since the inception of the ordinance, sorry the Charter amendment, I'm sorry. They are required to make a declaration whether the project or the unit that they are applying for is going to be used as a transient accommodation unit.

Mr. Kualii'i: So the first one, they are saying not.

Mr. Dahilig: So if they check off the box and say no, then that is falling out already.

Mr. Kualii'i: It's not applicable. Even though later their ability to produce a second unit, which they would then choose to make as a TVR, it's only one (1)?

Mr. Dahilig: It's only one (1).

Mr. Kualii'i: So it doesn't apply.

Mr. Dahilig: And we would rely on their earlier representation for the first unit that it is not a TAU. That therefore, there would only be one (1) potential TAU on the lot if their density was for two (2) or if they wanted to convert the first house into a TAU, then at that point, we would kick everything over to the new process.

Mr. Kualii'i: Right. Then in the very beginning you had a slide on the General Plan, I'm just curious as to the two (2) policy statements where it says encourage and support resort development on lands planned and zoned for resort use, primarily at Princeville, Kapa'a, Wailua and Po'ipū which are the VDAs right? So it's primarily so where else? The next policy says planned for limited number of visitor accommodations on the west side to be provided in residential and in style buildings, so I assume that sort of answers the where else and that's the Kapalawai?

Ms. Williams: We also have VDA in Līhu'e as well, and our General Plan does include an appendix that has a listing of those specific projects that are so-called planned and zoned for resort use as well. But mostly, it essentially is describing our visitor destination area and those three (3) locations are our main visitor destination areas that you might find pockets such as in Līhu'e and I believe on the west side, as well. We have some VDA as well.

Mr. Kuali'i: So in that bullet you say limited number, is there a number, what that number is?

Ms. Williams: I don't believe a specific number was identified in the General Plan.

Mr. Kuali'i: Then on the other slide with all the growth scenarios, and that basically highlights the three (3) VDAs you were talking about and then the only development that is not in one of the three (3) VDAs is before those maps, the whole listing? But the only development that is not in the VDA is that west side, Kapalawai? It has two hundred and fifty (250) units?

Ms. Williams: Yes. I will have to check on whether or not that is in the VDA, but it is currently, it does have its final discretionary permit, Kapalawai.

Mr. Kuali'i: Can you go through that listing there? Now that is showing four thousand six hundred and fifty (4,650) units, and you talked about how they either do not apply or they might qualify for exemption, and then I think Mike talked about the certificate having a time limit to prevent squatting on the certificate. Don't the permits also have time limits and so if you were cleaning out this list as far as, I mean you could project forward that if a certain project doesn't develop by a certain time, their permits would expire. If they did, they would have to come back through this whole process, correct?

Mr. Dahilig: Most of these permits do not have an expiration date, I could be mistaken, there may be one (1) or two (2) but generally there have not been expiration dates. As Councilmember Bynum alluded to through his questioning, there are conditions within the permits that a lot of times are on a timing basis. For instance, you are to put in a road by 2013 and put in the sewer by 2016 and build the school by 2024 and if those thresholds aren't met, then that could be cause for the permit to be in trouble and the Commission could look at revoking the permits.

Mr. Kuali'i: And then on your cycle for the application on the allocation process you said the request for TAU certificates would be accepted on a first come first served basis. That seem like it is potentially could be chaotic and people may be camping out. So I'm wondering how far in advance would applicants be allowed to apply and are you going to have some kind of wait-list for future years or periods, they are apply for the five-year cycle?

Ms. Williams: They wouldn't be allowed to apply in advance. They would have after and this would all occur in the first few months of our five-year allocation cycle. But after January 31, the first business day after Commission adopts a number of certificates that will be available, that business day is when the Planning Department will begin accepting not only

requests for TAU certificates, but the complete application, as well. It's true that there could be a line, and I imagine we would have to develop rules to guide, to make that organized.

Mr. Dahilig: Just to add, your question begs along the line the lottery process was an initial proposal in 2386. As we know 4th of July camping permits come around a lot of people bring their coolers and chairs and the radios and they sit outside and they wait to get the camping permits for that 4th of July weekend and we wanted to avoid that kind of scenario. But given the larger amount now of units available at one (1) time, versus the earlier scenario which was a smaller amount, that we think there may be less of a rush to the door to get in line first and rather proceed as if you are filing a normal permit.

Mr. Kualii'i: I think my last question has to do with banking and paying down and allocation, so those projects that are exempt, or those developments that have been pre-approved and all have the permits in process and they just haven't built, they have the right to build, right? So their ability to build is determined by the market so the market got really good, and they built a lot, then your system's ability to account for that is unlimited? They are pre-approved and if they built it all out next year or in the next two (2) or three (3) years, you would create a debt account, to count against the growth rate and you would just pay it over time, whether it's the next five (5) years, ten (10) years or even twenty (20) years, right?

Ms. Williams: That's correct. That is how it would work.

Mr. Kualii'i: That is why you did that fifty percent (50%) example even though it's extreme to show that the right to build and they would and you would account for it against the growth rate by creating that debt and paying it off over time. But you are limiting that only to twenty percent (20%) to still allow for new growth, other growth?

Ms. Williams: That's correct. To avoid a moratorium and to allow for some prospective growth.

Mr. Kualii'i: It's interesting because it's not only about the pace of growth but the total allowed growth and where we end up. If these projects are already pre-approved and it's the economy that has held them back from developing, it's already sort of accounted for in the community and in the landscape, you know? So whether they completed it next year or took ten (10) to twenty (20) years, the fact that they are pre-approved and perhaps take into account that they are in the VDA, that's another important point. I think to a certain degree it will be the market that determines, I hope, it gets better and it's good for everyone with jobs. Thank you. This is a really good presentation. I learned a lot and I think our citizens learned, too. Thank you.

Ms. Williams: Councilmember Rapozo has another question.

Mr. Rapozo: Thank you. I think it was talked about the floodgates would be open and everybody is going to come in and apply for their exemption. Is your current staff enough to accommodate that work flow and get these things done within sixty (60) days? I'm kind of hesitant with the sixty (60) day automatic approval, because I have a feeling it might take longer time and I don't want us to see us approving exemptions without being properly vetted through

the process. Is that something that you feel will be sufficient? Is there a need to put some kind of safety net in that section, so that if it's longer than sixty (60) days, then something happens before an automatic approval? You need to be realistic with us and tell us if sixty (60) days is sufficient?

Mr. Dahilig: Thank you for the question. I would hesitate to say that we do and maybe what is the best course for me is to check with my staff to already lay out what the potential is for the floodgates to come in and whether we are equipped. At this point, I can't provide you an answer, because maybe I should talk to my staff first.

Mr. Rapozo: That is one of the questions, Madame Chair that we need to clarify and if I may, I have just a couple more. Going back to the growth scenario Mr. Bynum talked about, I would ask that we be provided with a breakdown for each of those projects with each entitlement type and whether or not they are in compliance as of this date. I think that is important for us that are important. I want to know how many of these projects actually are in compliance with the permit and if any of them are not in compliance and some of the conditions have not been met by their deadlines, I would like to know what the Planning Department's direction is as far as that specific permit. The other thing is the allowable costs and I think the twenty percent (20%) is a fair number. I think and you made reference to it but it's really a case law that tells us that it can be less, and I believe that the twenty percent (20%) is safe. The question is what would be considered? I think that definition in the section right now is too broad and we need to tighten that up with specific types of allowable expenditures. It's not going to be a problem for the projects that already laid down road and infrastructure, hard infrastructure, but I think with the cost of architectural and what was the other term? Whatever it was...

Mr. Bynum: Engineering.

Mr. Rapozo: Engineering... Those rally up pretty quick. The last question for you folks today, as we talked a lot about the TVRs and second units and first units but this Bill, and I will try to read the definition and it's not real clear of the TAU, doesn't it only apply to the VDA? Am I correct? As I read the definition today, TAU means any and all of the following, but there is item (e), transient vacation rental, if someone wanted to build a transient vacation rental outside of the VDA...

Mr. Bynum: They cannot, it's against the law.

Mr. Furfaro: I hope you say they cannot, it's against the law.

Mr. Rapozo: I'm seeing a ton of applications coming through now.

Mr. Dahilig: The function of the VDA ordinance, these definitions would only apply.

Chair Nakamura: Would you speak into the mic.

Mr. Dahilig: I'm sorry. These definitions would only apply prospectively. So anyone wanting to build something new, whether it is a TVR or resort project, this is what we would determine whether it falls into the new

category of permitting. The permits that are coming through right now are consequence of ordinance 904 which deals with grandfathering issues and parallels, but doesn't cross into what I would say the 3.19 issues.

Mr. Rapozo: Is there a possibility of any project outside of the VDA? They're not going to be covered by this ordinance, correct?

Mr. Dahilig: I would say the only circumstances would be if the Council was to...

Mr. Rapozo: You'd have to basically, if somebody wants to change the zoning to resort, that would kick in?

Mr. Dahilig: Exactly, yes.

Mr. Rapozo: And obviously multi-family TVRs are illegal outside of the VDA anyway. Thank you.

Mr. Furfaro: Madame Chair, I have something.

Chair Nakamura: Sure.

Mr. Furfaro: Mike, I want to make sure, since I didn't hear the answer, that's correct, this Bill only deals with the current visitor accommodation areas. I want to revisit your earlier statement, you are dealing with bill 904 right now on those that earlier implied that they met the criteria for being grandfathered outside of the VDA?

Mr. Dahilig: That's correct, Chair.

Mr. Furfaro: Thank you.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Thank you. Just to finish that, however TAUs that are grandfathered are counted as existing and because you are processing them, you don't know yet how many are going to be counted in the existing category, right?

Ms. Williams: I would imagine that most of those are already on our existing visitor plan inventory and have been counted, since that is one of the requirements that they had to be existing. So they should already be part of our baseline that we use to determine our allocated TAU certificates. That is how they would be counted.

Ms. Yukimura: On the other hand, some of them may be counted as existing but may not achieve grandfathered status because they may be existing after the deadline for grandfathering, right? So they might fall out?

Ms. Williams: Yes. You are right about that.

Ms. Yukimura: Okay. My next question is somewhat operational and yet as we're finding out they can make a big difference in terms of what the numbers are. So in the submittals in terms of expenditures, are you asking that these be submitted under penalty of perjury?

Mr. Dahilig: Certainly, I understand where you are coming from Councilmember and certainly if the Council wanted to... certainly, as a sworn affidavit is a requirement that the Council would like to see as accompanying the submittal to the department because I know that's not in there right now. But certainly that would achieve that layer of protection from perjury.

Ms. Yukimura: Yeah it's a backup to your accounting review you are going to do, but if there is no real emphasis on accuracy, you could have people telling their architects to put it in one (1) category rather than another to just boost up the expenditure lines. There are going to be cases where I think they will be so far over the line that there will be no question. But where it's possibly close, then you just want honesty and accuracy. I hope you are doing that with the TVRs area as well?

Mr. Dahilig: Certainly am.

Ms. Yukimura: Thank you. I think that is all I have right now. Thank you.

Chair Nakamura: Okay. Are there any other questions? I'm going to ask one question, can we go to the slide with the list of potentially exempt projects. So assuming a healthy economy and a one point five (1.5) per year growth rate, how long would it take to build out these four thousand six hundred fifty (4,650) units?

Ms. Williams: Well, at this point any timeframe that we give, I would be speculating and I know that some of these projects, they are going to be developed in phases and it could take up to twenty (20) years or more for the final phase to be completed, if they go on schedule. So I would say that the build out, the final build out for this list will most likely be twenty (20) or thirty (30) years.

Chair Nakamura: We have a list now of some items that we would like some follow-up on. So I just want to make sure that we're clear about what we're asking for. The first one (1) is the occupancy permits and I think maybe if we look at 2009-2010, that would probably be adequate. Does that seem reasonable to you?

Mr. Dahilig: We can provide that.

Chair Nakamura: Then questions about whether these existing projects are in compliance with zoning and other conditions of approval. Is that something that is also readily available or will that take some time to analyze?

Mr. Dahilig: It will take some time to analyze. What I would suggest though is that rather than making a call whether they are in violation of the permit or not is flagging zoning permits that have conditions that I guess precede today's date. I would not want to pass judgment because that is a call that the Planning Commission needs to be making on if there is a violation necessitating modification or revocation. We could flag it and show where there are conditions that have requirements that precede today's date and approach that way.

Chair Nakamura: Okay. So we're going to flag the permits with those conditions of deadlines and we're saying that there aren't too many of those out there, that putting at the deadlines on these approvals is more recent?

Mr. Dahilig: I would hate to generalize, given the variety of projects and not specifically point out one (1) project over another.

Ms. Yukimura: Chair?

Chair Nakamura: Yes.

Ms. Yukimura: Can I ask a question regarding this particular point? Is the deadline today or is the deadline 2008 that the permits were supposed to be viable?

Mr. Dahilig: What I'll do is I'll provide both dates then.

Ms. Yukimura: But it's almost a legal and certainly policy decision that we need to be clear about in the law.

Mr. Dahilig: I understand. Looking at whether the revocation or modification is possible, which I think is what is being alluded to, unless I'm mistaken. For instance, if there was a condition that required to be met in the permit for a road to be built in 2010, but the road wasn't built in 2010, would the Council want to see whether there is grounds for revocation of the permit or not? So I mean that is why I suggest that the period between 08 and now could also necessitate, could be flagged and something that you would...that is in my explanation why I would say that.

Chair Nakamura: Councilmember Kualii.

Mr. Kualii: Looking at this list, Marie, you said earlier that last year we saw quite a few projects leave our inventory. So how many and what were the reason and do you anticipate any more of that this year?

Ms. Williams: I believe that last year our inventory was nine thousand and four hundred (9,400) visitor units and I don't have them off the top of my head and we can definitely get those specific projects to you. It's quite easy to do, because DBEDT plan does identify that in their yearly report. So we can easily get that to you.

Chair Nakamura: I think the final follow-up I have here has to do with Councilmember Rapozo's question about adequate staffing and is sixty (60) days adequate to process the exemption requests and TAU requests? So that would be the third follow up I have in my list.

Ms. Yukimura: I have two (2) more questions.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Thank you. If you add up the existing, the exempt, and the growth scenarios that eventually build out, what is that number?

Ms. Williams: If we add the total number of everything in this table to our existing inventory?

Ms. Yukimura: Yes. Existing and exempt.

Ms. Williams: And exempt? Well, since nothing is exempt right now, it would most likely be drawn from that list. I believe our existing inventory as of last year was nine thousand four hundred (9,400), around that number, plus...

Mr. Furfaro: Nine thousand four hundred twenty-seven (9,427).

Ms. Williams: Thank you, nine thousand four hundred and twenty-seven (9,427) plus four thousand six hundred and fifty (4,650) and that number is fourteen thousand and seventy-seven (14,077). And again, that is assuming a hundred percent (100%) build out of that number. What our General Plan does to determine if the project within the VDA will be one built out and percentage will be used as an actual TAU, they use sixty-five percent (65%) for a multi-family building and thirty-five percent (35%) for a subdivision, simply because many of these homes are used as a primary residence, a second home, a long-term rental and once you incorporate that percentage, that might be a more accurate number of our build out as is. We can get that to you.

Ms. Yukimura: And that would be of the four thousand six hundred (4,600), not the ninety-four (94) that are certified visitor units?

Ms. Williams: They are in visitor inventory.

Ms. Yukimura: Right, okay. So what made Planning choose the twenty percent (20%) as the level over excess growth? What was the reason for choosing twenty percent (20%)?

Ms. Williams: Oh, to apply for the excess growth?

Ms. Yukimura: To apply into the next scenario?

Ms. Williams: Okay, well we looked at the average number of units in a resort project and it ranged from and the average, if I remember correctly, is about a hundred and fifty (150). So we wanted to accommodate some of these projects, some of these, whether it's a three hundred (300) unit project or one hundred and fifty (150) unit project, accommodating two (2) or three (3) of them every five (5) years, we thought that was a reasonable amount of projects that could be allowed, if we only would allow eighty percent (80%) of the allocation to prospective applicants.

Ms. Yukimura: When you say you looked at average units in a resort project, so and what was that, about three hundred (300), you said?

Ms. Williams: I'm sorry, I don't remember the exact number, but even looking at this list, you can see it runs from actually over one hundred fifty (150), it will probably be three hundred (300) that is the average.

Ms. Yukimura: Okay and you were looking to accommodate that on a yearly basis?

Ms. Williams: It wouldn't be a yearly basis, but the five-year cycle.

Ms. Yukimura: Thank you very much.

Chair Nakamura: Why don't we have one (1) more question?
Councilmember Bynum.

Mr. Bynum: In the exemption requirements, replying to the Planning Director within one (1) year of the ordinance, so this entire list has to do an application and you have to make a determination, specifically if they are exempt or not within one (1) year, are that correct?

Mr. Dahilig: Again not specifically pointing out projects over other projects. Those that would say that they have the last discretionary rule, those would be the guys coming into my Department.

Mr. Bynum: I will follow-up on that later.

Chair Nakamura: Let's take a recess.

Mr. Rapozo: Can I just, because we still have about three (3) minutes and seventeen (17) seconds left. I think I want to be clear and I think you covered it earlier is some projects are not applicable. They don't apply to this ordinance so there is no application for exemption or anything. If they meet those conditions that typically is that class four (4) zoning and there is no more discretionary permitting, they don't have to apply for an exemption. They're excluded from the ordinance. They're not applicable? That is how it's written today?

Mr. Dahilig: Right.

Mr. Rapozo: The ones that don't or they have some outstanding conditions or they haven't been given their final permits, they need to come in and apply for an exemption basically showing their twenty percent (20%) contribution or expenditure?

Mr. Dahilig: That's correct.

Mr. Rapozo: So I want to make sure that is clear that there's a non-applicability to projects that have met and secured their permits and haven't been built?

Mr. Dahilig: Correct.

Mr. Rapozo: Okay, thank you.

There being no objections, the Committee recessed at 11:11 a.m.

The Committee reconvened at 11:28 a.m., and proceeded as follows:

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: My question is instead of a first come first serve basis, could we not require or could we not have a process that would choose the best to go first that is set up some criteria for what we want out of resorts and show that those that are energy efficient, have a good track record in the past (inaudible) transient stops or have figured out transportation, there's a whole number of criteria that show good quality and good planning in a way of bonus points or something like that. And I'm thinking that this happened in Davis, California in terms of residential development, they had allocations and they chose among the applications based on the best developments, the best development proposals.

Mr. Dahilig: Thanks for your question. I certainly understand the desire to want to have the best planned projects be the guys that are let through the gates first, but the way the Bill is currently written, the interface of the certificate with the permit approvals necessitates action by the Department and the Planning Commission along a certain time. For example, we couldn't just pull the applications, take a look and then say okay (a), (b) and (c) go because of the pairing and there's a reason why we do the pairing again is to gage seriousness of development and not allow squatting. Beyond in terms of what the best projects are... to avoid matters where decisions could be viewed as arbitrary and capricious, we would need a gamut of standards of which to judge by so that there is some level of evaluation and transparency. There could be a lengthy discussion on what exactly those are but those types of standards would also be folded into how these allocations would be done and along with a change in how we approach this issue of squatting.

Ms. Yukimura: I mean I suppose this would be useful only if you have like you say, people standing by the door, I mean you know standing in line at the door.

Mr. Dahilig: That's correct.

Ms. Yukimura: But I would assume that we have to have some standards at some point, that's one of our long range goals and so instead of constantly just doing crisis management, if we could somehow as we address this and this is a crisis. I mean, it's due to a breakdown of our regular planning process that we had this intervention from citizens in a very unusual planning mode, right? If you even call it a planning mode, it might just be in response to breakdown in planning. I really commend you for the way you have looked at this very complex crisis, and tried to give some order and fairness to it all. And keep it along the lines of good planning and maybe just take that effort a step further and see if there aren't some general criteria, if you come to the situation you have people standing in line at the door.

Mr. Dahilig: Okay.

Ms. Yukimura: Because to the certain extent, just who got there first early in the morning isn't best criteria either, you know what I mean?

Mr. Dahilig: I certainly understand.

Ms. Yukimura: Thank you.

Chair Nakamura: Chair Furfaro.

Mr. Furfaro: Thank you Chairwoman. Along those lines is the thought about best project/best value and even to the point that some of them may consider through an affidavit in their application to initiate reducing the project's density on their own initiative.

Mr. Dahilig: This would be for prospective projects?

Mr. Furfaro: Yes.

Mr. Dahilig: Certainly, if that is a policy judgment that the Council would like to see as a consequence of prospective action on new applications, it is certainly something that deserves merit and we could certainly look at. What I would ask though, if that was the case, we would need standards for evaluation that does not lead to our department being in a position of making arbitrary and capricious decision.

Mr. Furfaro: Yes and obviously those standards can also be compared to the American Hotel and Motel Association, where reduced density generate a higher average rates and those average rates can contribute bigger portion to the transient accommodation tax and those types of things in a voluntary basis to build, but reduce density.

Mr. Dahilig: Okay.

Mr. Furfaro: I only share that because Councilmember Yukimura brought the idea up.

Mr. Dahilig: Okay.

Mr. Furfaro: That we're going through so many renovations right now, the product on Kaua'i between Hyatt and Marriott and so forth, they have all re-invested in their projects. So we have a lower inventory, but of a much higher quality. Thank you Chairwoman.

Chair Nakamura: Any further questions? Councilmember Kualii.

Mr. Kualii: I noticed one of the slides which were on the why might there be excess growth and one of the bullets was the DHHL projects. What do you mean by DHHL projects?

Ms. Williams: I think in the past that the Department of Hawaiian Homelands, as you may know that they own certain vacant parcels on Kaua'i and that they have solicited interest in the past to develop those project as resort projects and I don't think anything is active right now, but in the future as we look long-term it is feasible that those projects could have an interest in developing that land as resort. The Department of Hawaiian Homelands could choose to even if this Bill is implemented.

Mr. Kualii: So you are just trying to account for any and all resort-type development to count it against the growth rate?

Ms. Williams: That's correct.

Mr. Kuali'i: The other thing is and I think you sort of answered it to Councilmember Yukimura's question, but I don't know that I was clear on it. You know the bank and this paying it down? If there is so much pre-approved development and ultimately it's all going to come online, and we don't necessarily know how long it takes, because it depends on the market, but we do want to account for it against the growth, the allowed growth over time. If we allow it to build up as a debt and pay it over a long period of time and we only account for it at a twenty percent (20%) rate, wouldn't we over a long period of time, wouldn't that eighty percent (80%) potentially get us to a point of more development than we really want? I mean, why wouldn't we try to pay down that debt more, you know? Like forty percent (40%) and still have sixty percent (60%) available for new growth beyond this four thousand (4,000), whatever. There is a lot of growth that is going to happen that is in the pipeline, that is tied to all of those projects you have shown and in the VDAs, so the new growth, I mean, I would think we have to give priority to the old growth and pay down our debt, you know? And not over the next forty (40), fifty (50) years, but hopefully over the next twenty (20), just at a rate higher than twenty percent (20%). So is there a higher rate we could do and still be legally permissive to new development, if you will? How did you come up with the twenty percent (20%) and allowing eighty percent (80%) towards the (inaudible) eighty percent (80%) of the one point five percent (1.5%) growth?

Ms. Williams: The number of twenty percent (20%) was a policy call and you are absolutely right, it could be increased to thirty (30) or forty (40) or fifty percent (50%), if you feel that is a more appropriate number and it would, of course, result in a payoff period that is shorter. That's true.

Mr. Kuali'i: So when and how is that policy established?
Or it's to be established?

Mr. Dahilig: I guess the slide that Marie had with respect to what could cause growth beyond the seven point seven (7.7) scenario, this mechanism was a proposal to accommodate for, say DHHL, because they don't have to comply with County zoning requirements and they can build whatever they want but say they want to...

Mr. Kuali'i: But they do have a primary mission to put families in homes?

Mr. Dahilig: Yes. Not making any judgment call, but for the example that they decide to put in a thousand TAUs somewhere on the island. It increases it definitely beyond the seven point seven (7.7) projected increase. This mechanism was meant as a consequence to try to drop the growth rate and a means to balance out these things that this ordinance will not have any jurisdiction or control over. Included in that bunch is single family transient vacation rental within the visitor destination area that is on lots that are allowed one unit. There is going to be that natural growth as well.

Mr. Kuali'i: But knowing that we already have all of this development in the pipeline, is twenty percent (20%) dropping the growth rate enough to allow for that? Overall, it's really about where we end up or is it about the pace at which we get there? Maybe it's both, because if it's all happening at once, it could be kind of chaotic, like the dust bowl in Po'ipū was for a while there.

Mr. Dahilig: I guess I would say that two (2) questions need to be asked. First off, does the backlog need to be addressed with some type of accommodating service, like a debt service or however you want to characterize it? Then if yes, then what is a realistic percentage to bring down the rate of growth? Those are questions that we think twenty percent (20%) and again the twenty percent (20%) number is really driven more from things that we do not have control over scenario. But if we wanted to now treat the four thousand (4,000) units as something that we want to amortize over time, then certainly twenty percent (20%) or thirty percent (30%) or how long it takes to pay down the number is up for discussion.

I think what I would say from an operational standpoint and also having a hand when the legislation first was coming out, was that the concern was if you take an average resort project and you bring down the allocation too much, are you going to be in a position to not to allow one hotel every five (5) years? And let's say the allocation is six hundred (600) and the policy call is to pay off that fifty percent (50%) of the six hundred (600) and the resort comes in at three hundred and fifty (350) units, one resort in a five-year time span. Then it goes beyond the ability of my department to start the permitting process and it would be kicked to the Council. So what I was suggesting to the Council is if there is a desire to frame some type of debt service that it just keep in mind that that having the ability to permit one (1) hotel project every five (5) years may be something to consider and what is lopped off the top of the allocation for debt service?

Mr. Kuali'i: So based on the numbers now, the estimated, weren't you talking about seven hundred and twelve (712) units per year or is that for five (5) years of the?

Ms. Williams: That would be for the first cycles.

Mr. Kuali'i: Which is five (5) years.

Ms. Williams: Number of available TAU's certificates and of course through the compounding growth rate or through growth rate in our base which is our TAU inventory, that number would probably get larger unless our TAU inventory decreases and some years it does. So it would start off probably with a number that is close to seven hundred (700).

Mr. Kuali'i: So it's not a matter of whether we could, it would be possible to have a hotel every five (5) years; it's a matter of how big a hotel you would want every five (5) years? I mean if the seven hundred twelve (712) number, you took twenty percent (20%) off of that and it's a hundred and forty-six (146), you still would have five hundred and sixty-six (566). It's all relative as far as how many units you need to build a green, sustainable, good hotel near...

Mr. Dahilig: It's certainly a recommendation on my part, it's a policy call.

Mr. Kuali'i: Okay, thank you.

Chair Nakamura: Councilmember Yukimura.

Ms. Nakamura: We're going by certain parameters, we have quite a few givens, and nobody's asking is it good to have a hotel every five (5) years in terms of infrastructure adequacy and occupancy and visitor satisfaction? I mean,

Council Chair Furfaro, you know, really reminds us that you have too much growth and then that affects occupancies in our hotels. And below a certain limit, hotels can't even break even. So if you can get the eighty-five (85), ninety percent (90%) occupancies, you can have prospering hotels, workers who are working full-time without having to worry about cut hours and so forth. So there are all kinds of implications and our General Plan was done, I'm not sure that it was done with all of those thoughts that said, this is the growth rate we want that is going to be manageable in terms of our infrastructure and going to give us good occupancy in our hotels, which is kind of our ultimate goals and a thriving good reputation for Kaua'i that ensures a sustained and prosperous visitor industry. I'm guessing that we get to ask those basic questions at the next General Plan. This process that we're dealing with this morning sort of ends or could change at next General Plan level. So can you just tell us when that is? What is the timetable for that? That could tell us how long this system is going to be in place.

Mr. Dahilig: Well, the General Plan from a technical study-standpoint is on the move now and what we project is completion of the study, because of the varying nature of what we're requesting, between twelve (12) to eighteen (18) months is what we're hoping that we can start seeing drafts where we can start launching the full General Plan. What we're looking at potentially is three (3) to four (4), five (5) year horizon when you would actually see something that would come for approval. The process is starting now. Once those things start, it would probably be another two (2) to three (3) years after the technical studies are done to actually integrate everything and do all the community meetings and notice requirements and those types of things.

Ms. Yukimura: I hope that in this process for the next General Plan, we will learn from our experience with the General Plan that is in place now and I will send follow-up questions separate from this particular Bill. But in terms of how we could do a general plan process that actually achieves the goals we're trying to achieve here, we couldn't somehow through the general plan process?

Mr. Dahilig: Certainly.

Ms. Yukimura: Thank you very much.

Chair Nakamura: Councilmember Rapozo.

Mr. Rapozo: Thank you. And I would guess that very few projects will be built between now and then. Reality is hitting me as we speak. My question is and I didn't really notice until the presentation that the General Plan talks about supporting and encouraging resort management on lands planned for resort use. Doesn't this ordinance pretty much contradict that to some extent? Because as I'm hearing the discussion around the table and until we get a new General Plan, this is the guideline that we follow. But it doesn't sound like we're being too supportive or encouraging of resort development in areas that are zoned as such.

Mr. Dahilig: The department has always taken the position that the Charter amendment contradicts the intent of the General Plan and it's something that we have always been consistent on. Because of the statement you just made, Councilmember, and also, the fact that when you look at the General Plan language and planning growth range and you look at what the Charter amendment is written, the Charter amendment refers to units. The

General Plan refers to visitor population. So already from the get-go, there is that contradiction, but because charter amendment supersedes the supreme law of the county, this effort is meant to try to comport what is the General Plan language with what is the supreme law of the Council.

Mr. Rapozo: Okay and I apologize, because I wasn't here when this all came about. Like I said, it didn't hit me until today. The market will determine what happens in that industry. It's not going to be that table. We can make the best Bill/ordinance, but at the end of day, the market will determine and not the number set by this county and that is one of the concerns that we have got to look at is number one (1), whether or not the Charter supersedes the General Plan. I think the General Plan does deserve some respect as well. And it's a battle that I'm dealing with right now. Obviously we have to do what the Charter tells us we have to do, but we must also keep in mind what the General Plan that many, many people participated in and yes, it may be old, but until we get a new one (1), I think we need to give that document as much respect as we give the Charter.

Mr. Dahilig: Certainly.

Mr. Rapozo: Thank you.

Chair Nakamura: Chair Furfaro.

Mr. Furfaro: Mike, I just want to go back and revisit our last budget session.

Mr. Dahilig: Yes.

Mr. Furfaro: And make sure we're all copacetic on this new General Plan. The Planning Department requested one point two (1.2) million dollars from this Council for the General Plan.

Mr. Dahilig: Correct.

Mr. Furfaro: We agreed on six hundred thousand (600,000) this year and six hundred thousand (600,000) next year, but with the money we approved it was going to cover what we refer to as the three (3) technical reports that you requested to gather data.

Mr. Dahilig: That's correct.

Mr. Furfaro: And you have entered into those contracts?

Mr. Dahilig: We have placed the items on an RFQ list for professional services and we believe that the list is coming shortly, the close was on Monday. So they went out at the beginning of the fiscal year.

Mr. Furfaro: So we're just six (6) weeks into the new budget. So you are moving along, that direction hasn't changed and we would hopefully have this research and technical information ready for next year?

Mr. Dahilig: Yes Chair.

Mr. Furfaro: Thank you.

Chair Nakamura: Thank you for clarifying the timeline there. Any further questions for Mike or Marie? So thank you very much for your responses, and what we're going to do now is open it up to the public for testimony. Do we have a list of people who signed up? Would anyone like to testify on this Bill? Can you raise your hand if you want to testify, so we know. We have a couple. Ken Taylor followed by Carl Imparato. Ken, you're not going to? Okay Carl can you come up?

CARL IMPARATO: Aloha Councilmembers, my name is Carl Imparato. I don't have too many comments and first of all I would like to recognize all the work that has been done to get us to this point and result in Bill 2410 being much improved over Bill 2386. Bill 2410 lays out a good framework to address the problems before us. But there are still a number of very important details that need either elaboration or modification. The most important of them, first of all, is a tighter definition of the projects that would be exempted from the process. What we have heard today is that the standard that is being proposed is a standard that says you are either non-applicable or exempt if you meet an "or" criterion or if you have your last permits or you have spent substantial sums. My understanding of the vesting criterion and zoning estoppels criterion is a requirement-you must have your last discretionary permits and have spent substantial sums. That makes a difference, whether you have an "or" or an "and" criterion. There was on the list that got their permit in 1990, almost twenty (20) years and I know that project doesn't even have an SMA permit. To say that project basically moves forward under this criteria is a concern. You need to look at the definition of projects that would be exempted closely.

Second key issue is a need to pay off the bubble of the backlog, that four thousand (4,000) plus approved, but not yet built units at a rate that is far more credible than twenty percent (20%) of the budget. For example, if just three thousand (3,000) of that backlog was paid off at twenty percent (20%) criterion, that is one hundred forty (140) units every five (5) years and divide three thousand (3,000) by a hundred fifty (150), it's twenty (20) cycles, it's a hundred (100) years. Over that hundred (100) year period you continue to approve projects by using eighty percent (80%) of your certificates. So that is a concern that if we really want to credibly address this issue, we need to maybe up that criterion or that payoff criterion. As an aside, I do want to mention that of the four thousand (4,000) plus units approved on that table, probably three thousand (3,000) of them haven't been built yet and when earlier on someone spoke to the question of whether we have tied approval of the projects to the infrastructure, I think the answer is a definite no. We have 3,000 units that haven't been built and we already have major infrastructure problems out there. Of those three thousand (3,000) we'd have nothing to say about coming online I think will make it pretty clear we haven't linked the two.

There are a few other technical problems that we laid out last week and they are still here. The rapid-growth scenario, while it may or may not occur, we need to be prepared for it. Five (5) years ago, nobody thought we would be in the position that we are in today and five (5) years from now, who knows where we'll be? So we need a proposal that deals with the possibility that that four thousand (4,000) or three thousand (3,000) units is going to come online in the next five (5), ten (10) or fifteen (15) years and we shouldn't again merrily be approving more and more at the eighty percent (80%) rate in terms of the TAU certificates. There are a few other issues that I don't believe that the language necessarily does what the Bill

purports to do but hopefully we can clean those things up. In summary, I believe the way it's drafted now, I believe 2410 does not comply with Charter. It has though complied with the Charter with all scenarios, not just slow growth but also rapid growth scenarios. I hope we'll be able to work collaboratively. There has been a lot of good work done and I hope we can work collaboratively to resolve these issues, and come up with a Bill that does comply with the Charter amendment and the will of the people. Thank you all for your time.

Chair Nakamura: Thank you, questions for Carl?

Ms. Yukimura: I do.

Chair Nakamura: Councilmember Yukimura.

Ms. Yukimura: Thank you for your testimony. Is it your thought that the fifty percent (50%) scenario or the high-grow scenario, that the Bill does not address the high-growth scenario?

Mr. Imperato: When you say the high-growth scenario, I'm not sure?

Ms. Yukimura: The fifty percent (50%).

Chair Nakamura: The rapid-growth scenario.

Mr. Imperato: Oh, the rapid-growth scenario. The Bill has a mechanism to deal with it, but on such a slow, slow rate of complying with it, because it basically holds back so few certificates. Ironically, because if you have a big bubble of construction in a five-year period, that increases the number of TAUs that are in the inventory by such a large amount. Let's say you have an excess of three thousand (3,000) units and it all gets built at once. Now when you look at the next cycle of allocation, instead of having seven hundred (700) TAU certificates based on nine thousand (9,000) units you are going to have nine hundred (900) TAU certificates in the cycle based on twelve (12) or thirteen thousand (13,000) units. So the irony is that sort of the way the language is drafted and I view this as a technicality that needs to be addressed and not anything in bad faith. The way the bill is drafted on high-growth scenario, you say the worst the growth is in terms of exceeding the target, and then the more you are going to basically feed it.

Ms. Yukimura: Okay so your dissatisfaction with the way Bill 2410 works out in the rapid-growth scenario would be addressed by a higher payoff percentage? That is where we would apply the percentage of excess growth to the next cycle? You would like it to be forty (40) or fifty percent (50%) instead of twenty (20)?

Mr. Imperato: I think raising that number to something that is more credible, at least fifty percent (50%) deals with a lot of the problems. It deals with a number of issues. One is paying off the excess growth at a reasonable time horizon. The second thing is to the extent that you have a mechanism, when there is an excess, we plan to pay it off. Not in our great-grandchildren's time, but sooner. To the extent that you have that, maybe you don't have to be as tight in determining what are the exempt projects. If a few more horses get out of the barn because of a liberal criterion, you say we might have let a little too much out now, but we have a mechanism for catching up with it down the road. That is why I

believe a criterion of holding back at least fifty percent (50%) makes sense on a number of grounds. The last thing I would like to say on the fifty percent (50%) number is that if we're talking about in the first cycle having possibly over seven hundred (700) certificates, holding back fifty percent (50%) leaves three hundred fifty (350) and that is larger than virtually any conceivable hotel project we have seen before us. It's a reasonable number.

Ms. Yukimura: Okay. Thank you very much.

Chair Nakamura: Any other questions for Carl?
Councilmember Chang?

Mr. Chang: Was that a written testimony or were you
reading from your notes?

Mr. Imperato: I'm just reading from notes that I have taken
in response to...

Mr. Chang: Would you mind if we get a copy?

Mr. Imperato: What I could do is actually... it's severely
scrolled out but I will type it up and send it to your County Clerk.

Mr. Chang: Thank you.

Chair Nakamura: Any further questions? Thank you, Carl.

Mr. Imperato: Thank you all.

Chair Nakamura: Would anyone else like to testify at this
time? Mr. Mickens.

GLENN MICKENS: Thank you, Nadine. For the record Glenn
Mickens and you have a copy of my testimony. First I would like to thank Mike and
Marie for their fine presentation. I thought they did an excellent job. I have been
given... and you have a copy of this and also you have a copy of Walter Lewis last
thing. I believe he sent it to you, right, Nadine?

Chair Nakamura: Yes. He did.

Mr. Mickens: I have been given the testimony that Walter
Lewis has proposes a wise way for the Council to avoid another incident of ready,
fire, aim and notes that we don't have all the necessary information at this time
about the existing resort projects that the Bill seeks to exempt from the application
of the bill and makes the intelligent success that it should be obtained before
enactment. It seems obvious that the Council would like to transfer the authority to
process approvals of transient accommodation units to the Planning Commission as
a charter amendment adopted in 2008 allows. That can be done, but there is
no urgency. Despite the Planning Commission's outrageous disregard of the
guidelines, in the 2000 General Plan for transient accommodation unit growth it's
understandable that the Council may wish to give protection for landowners who
invested in proposed projects, but that protection should not be given through
exemptions as provided in Bill 2410 as it now reads which could violate the
materials of the Charter. Let's pause and identify the scope and nature of the
problem that the preliminary approval the Planning Commission has

bestowed and we'll be able to craft the Bill that will conform to the Charter and provide suitable assurances to the developers who are currently proposed to be awarded exemptions. We expect that developers will be objecting to the deferral, but you are reminded that your duty is not to a few owners who have never been adversely affected but to the citizen of the county who adopted the Charter amendment in 2008 and who expected that the Council could not let its provisions be violated. I wanted to say that I fully agree with JoAnn that owners' rights cannot be taken away by Charter or any other means. But as she pointed out before we over develop this island, what has been put in place to address our infrastructure, our roads, our water, our solid waste, etc., as one (1) example. Look at the Waipouli Beach Resort across from Safeway which was mandated to build an access road to alleviate traffic. That two hundred (200) foot road has not mitigated anything and has made getting out of Safeway a nightmare. Is this an example of what kinds of conditions we will put in future developments in Bill 2410? I think all these things have to be looked at but I'm as concerned as JoAnn is and I'm sure that all you Councilmembers are that the infrastructure... you're saying that the developer has put infrastructure in place and certain places, that gives them the right now to go ahead and build their project, if they've met those particular conditions. I'm not sure that they should have the right to come back in and go after permits again. If they were given those permits and within an eliminated time... four (4) years, five (5) years, they have done no development. Even if they put those things in there, I think that would be a protection for our island. That's my testimony.

Chair Nakamura: Thank you Mr. Mickens. Are there any questions for Mr. Mickens? Okay, thank you. Would anyone else like to testify at this time?

JOE ROSA: Good afternoon members of the Council. For the record Joe Rosa. I've heard all this talk about development, resort and all that. First things first, one of the biggest problems they say is traffic, traffic... the County cannot build the infrastructure that is needed, it is something that should be worked out with the State Department of Transportation. In 1950, the highway structure plan for this island was planned around this Līhu'e area and throughout the island. In thirty-six (36) years that I worked, it took them thirty-six (36) years to build Kapule Highway which was never finished and completed. It should have gone right across to Nāwiliwili Road and reach the Kukui Grove area, so that people going to the airport from the Westside didn't have to come through Līhu'e Town and add to all this traffic congestion. That's the problem that we have here, look ahead and think about it. Civil Defense say that we have adequate transportation to get evacuation... hell no, there's none of it because everything is one (1) way in and one (1) way out. We need access alternate routes. Anything happens, people living in the Kapa'a-Wailua area to go home, they got to go makai. DOT had plans mauka (inaudible) that would include a new Wailua Bridge, up mauka. All those kinds of things haven't been even scratched yet and you talk about development, tourism... get your highway structure fixed, work with DOT, I don't see anybody from DOT come around here. When they had a tsunami alert, the Po'ipū area was (inaudible) Kōloa Town because all of the resort areas there, the hotels, the tourist and everything... all comes into the Kōloa, all coming through the tree tunnel, no other alternate routes. Development (inaudible) or any place we travel by way of transportation, you don't have good transportation, there's no movement, there's traffic jams, everything. Not only is talk about development, I've never heard of a development being turned down because of the transportation problem. They just figure well we'll develop the highways later but you got to get those highways first so that you don't have that congestion when all that tourist start coming in. That

would create jobs, I know JoAnn mentioned the hotel development would create jobs with people and so did other Councilmembers but a highway would take at least two (2), three (3) years of work also. In 1950 the structure of the island area was planned. In sixty-one (61) years I have seen nothing change around the Līhu'e area. Sixty-one (61) years may I remind you, check the Kapaia Bridge and see what is completed. We need more infrastructure and with mauka infrastructure, the State D.O.T. had great roads to come into Līhu'e town from the mauka (inaudible) the entrance there Hardy Street intersection, (inaudible) Street at Isenberg tract there...

Chair Nakamura:
additional minutes.

Mr. Rosa three (3) minutes, three (3)

Mr. Rosa: Yes I know it's up but I'll take my additional three (3) if I may. Those are the kinds of things like I say... look into working with the D.O.T., get D.O.T. members, Mr. Ray McCormick, I talked to him about it and said you know more about the highway system on Kaua'i than I know. I say Ray, I worked in 1960, when things were on the planning board already, but nothing has been done except Kapule Highway which is totally incomplete. We had a totally beautiful infrastructure planned. Wouldn't have been bothered with this problem here and also in Kapa'a, that infrastructure would have killed all of these problems here that we had in Kapa'a and Līhu'e. I know when we did Kapule Highway, it's a problem, but it's caught up with it. Get the State and D.O.T., get Ron Kouchi, get Tokioka, Morikawa, our State Legislators and say what are you doing for Kaua'i? We need gas tax money for new highways and not just resurfacing. Where is the tax money we pay for gas? Those are the kind of things to look for and I will leave with you with those thoughts. I hope you can look into it and get some action. Thank you very much.

Chair Nakamura: Thank you, Mr. Rosa. Are there any questions for Mr. Rosa? Would anyone else like to testify?

DAVE ARAKAWA: Good afternoon Chair Nakamura, Vice Chair Yukimura and members of the Planning Committee and members of the Council. Dave Arakawa here on behalf of Land Use Research Foundation. At the outset we would like to thank you as a Council for your patience and thoughtful questions with respect to this matter and thank the Planning Director, Mr. Dahilig and Planner Williams and council for working so hard on these tough issues. Our testimony has four basic issues; I will just go quickly through them. And Councilmember Rapozo mentioned the first one about the Charter amendment contradicting the intent and process of the General Plan and so did Mr. Dahilig and Ms. Williams. That is very important the character of the government action of the Charter amendment was inconsistent with the Kaua'i General Plan. That is important in any legal review of this matter, the character of action being considered, the character of the Charter amendment. It contradicted or was in violation of the (inaudible) plan. Second, this was an important part. People might talk about the charter amendment and vote, but the law is when there is a finding of vested rights and vested estoppel, it trumps any vote on Charter questions or any vote by the populous and that was proven out in the Sandy Beach case that I handled as Corporation Counsel in Honolulu. There was a popular vote in that and the court overturned it. Third, we know it was a hard job, but we commend you folks, the Council and Planning Department and Corporation Counsel with respect to addressing non-applicable projects and exemptions. It looks like to a large part that they are based on fairness, equity and principles. Probably you folks might want to take a closer look at the definition and what constitutes

"substantial sums of money," and/or the type of projects, shoreline management areas were mentioned but just take another look at that. I'm sure the legal review will take another look at that and the planning department review. Last, we didn't think we'd have to mention it, but it came up. It looks like this version sticks with non-applicable, very simple. Non-applicable means "non-applicable," exempt means "exempt," so that seems very simple to understand and very simple to implement. And that is about it. I was going to say when you look in the dictionary under "exempt," it doesn't say "stand in line" when you look at the dictionary for "non-applicable," it doesn't say "stand in line." So we think this Bill is applicable in the State of Hawai'i.

Chair Nakamura: Thank you Mr. Arakawa. Are there any questions? Councilmember Yukimura.

Ms. Yukimura: Yes, I wanted to ask a question about your first statement that the Charter violated the General Plan.

Mr. Arakawa: It contradicts.

Ms. Yukimura: Or it contradicts the General Plan, but to the extent that it does not affect vested rights, it properly shapes or modifies the General Plan, does it not?

Mr. Arakawa: If it does not violate the vested rights.

Ms. Yukimura: To the extent that you steer clear of the vested rights issue, it actually modified the intention of the General Plan, which said allow all the development that is zoned for. all the resort development that is zoned for was the General Plan goal? And it seems that the charter amendment, which was through the vote of the people said no, we're not sure we want all the development that was zoned for, and we're here having to determine that place where we don't infringe on vested rights but we still honor the intent that perhaps not all the zoning should be allowed.

Mr. Arakawa: You know I get a lot of that. I forgot what the question was, I don't know if it was a question or history, but I got the first part of the question and that is that if you take care of... legally take care of the non-applicable projects and exempt projects does the Charter amendment work? Should that one point five percent (1.5%) be implemented? We would say yes, it should be, but first you have to take care of the non-applicable and exempt projects and can this process be implemented through that Charter amendment? The answer is yes. I would say so.

Ms. Yukimura: And when you say exempt...

Mr. Arakawa: Even if it is not consistent with the intent and the process of the General Plan.

Ms. Yukimura: Because actually the intent of the people of Kaua'i for the general planning process now becomes something different based on the vote to the extent that it doesn't affect vested rights, but let me ask you in your use of the words "exempt" and "non-applicable," you are holding those words as equivalent to "vested rights or zoning estoppels?"

Mr. Arakawa: Yes.

Ms. Yukimura:
saying. Thank you very much.

Okay. That way I understand what you are

Mr. Arakawa:
apply that one point five (1.5).

But going forward, like you said, yes you can

Chair Nakamura:
question. In your testimony you said something about taking another look at the definition of "substantial construction," and I was just wondering right now the Bill uses the twenty percent (20%); do you have concerns about the definition in the current Bill?

Mr. Arakawa:
concerns, but we do think that the more the Planning Department and Corporation Counsel take a look at case law and what is out there and take a look at how developments are actually done, it's hard to put... if you buy a piece of property for a hundred (100) million, it's hard before you get your final building permit to put twenty percent (20%) of that into the ground. It's a good thing that they are considering architecture and engineering costs, but I think Mr. Dahilig raised the issues of EIS and there are million-dollar EIS out there being done right now. Is that considered, is it not? So I think you folks as the Council and the Planning Department and Corp Counsel are looking at that issue seriously enough. We know you folks are concerned about it and looking at it seriously enough that twenty percent (20%) was a good starting point but we think there need to be more input and more information given to you folks, all of you folks on how a development works. Would somebody put in twenty percent (20%) of a hundred (100) million dollars or whatever it is, or a billion dollars or whatever it is, when they don't have any assurances?

Chair Nakamura:
also include planning and permitting cost?

Is your opinion that the definition should

Mr. Arakawa:

That's one of our positions, yes.

Chair Nakamura:
and because of your knowledge of this subject matter, it would be helpful to have that in writing.

If you have any specific recommendations,

Mr. Arakawa:
and in that Sandy Beach case, it was two hundred thousand in soft cost and planning cost but I respect Kaua'i is different from Honolulu, so you don't have to follow what O'ahu does. You do what you feel is right.

We can submit some information on case law

Chair Nakamura:
and it would be good to get your take on this.

It feels like there is a real range out there

Mr. Arakawa:
Planning Department, Corp Counsel and you folks are doing a good job in looking at these issues seriously.

We will submit our information. But your

Chair Nakamura:

Councilmember Rapozo?

Mr. Rapozo:
Counsel for Sandy Beach?

Thank you. So you said you were a Corporate

Mr. Arakawa: I was Corporate Counsel during Sandy Beach. We hired an outside attorney to handle it.

Mr. Rapozo: What was the value of the project at the time that the two hundred thousand dollars (\$200,000) was determined by the court to be substantial? Just rough numbers, was it like a lot less than twenty percent (20%)?

Mr. Arakawa: The value of the project?

Mr. Rapozo: Was the value of the project bigger than \$1 million?

Mr. Arakawa: Yes, of course. What happened was that I have the articles right here, the articles from that time but it was to the tune of fifty to seventy million dollars in damages that we had to pay or we had to exchange. Fifty to seventy million dollars based on two hundred thousand dollars in cost expended. That was a huge...

Mr. Rapozo: Well I'm just trying to figure out the percentage that the Court ruled was sufficient.

Mr. Arakawa: Two hundred thousand.

Mr. Rapozo: Right but that was... what was the value or assessed value of that project?

Mr. Arakawa: I can check on it. I know the settlement package was between sixty million to seventy million dollars that we had to settle with Kamehameha Schools and the developer.

Mr. Rapozo: Well I understand that these types of cases are very, very expensive when you're talking about owner's rights but the other question as it pertains to that same issue; what about a performance bond or some kind of bond that is required to be placed on that permit application? Basically, that's your commitment, your developer commitment said hey I'm going to build, I'm not just going to bring up an invoice that I paid two hundred thousand dollars for an EIS but no, here's my performance bond, I put up my money here's a bond, if I don't complete and fail, the bond kicks in, you get your money, I lose my permit and the next guy in line gets... I mean you want to show a serious commitment to project.

Mr. Arakawa: Often times in projects as large as this and that's why we should bring perhaps experts would help, they took out loans to purchase the property, so there thousands of dollars in interest, hundreds of thousands of dollars of interest a week just in interest on the purchase of the property. That's a huge commitment right there and with respect to that I can understand your concern, the market like you said, the market dictates when projects go forward and stall to a certain extent and they're seeing it at the State Land Use Commission where people have to come in and say look we didn't meet our schedule, it's because the market went down and so the State Land Use Commission say, okay we'll give you an extension. I'm not familiar with how Kaua'i County do it but I know on O'ahu as an attorney for developers, we'd have to come in and say look we didn't hit our deadlines on our SMA, we didn't hit our deadlines on our zoning and it's because of this... (x), (y), (z) and they'll say, okay we

understand the whole industry is like that and we'll give you an extension. I think if there's a good back and forth between the developer and the County Council or the Planning Department, that's good but when somebody just in your face disregards the Council or disregards the Planning Department, you folks have the authority to do what you need to do to revoke permits. I think almost every permit has that condition in it that they can have their approval revoked if they...

Mr. Rapozo: But you know I would and I don't know this but I would bet twenty bucks right now that we never revoked a permit. Just look at the chart that was put on the PowerPoint. Like one of the testifiers said, back to 1990. So there's some concerns about that and I think this is without limit on exemptions, this is like when everything is a go... add in that, all of a sudden it changes things. Guys will have to hang on to their exemptions and that's what I'm afraid of, is you're going to have people hang on to an exemption or permit that somebody else could be ready to build on and that is I think what I want to stray away from.

Mr. Arakawa: You raised an excellent point and it happens through all strata of society. Tutu, grandma, grandpa holding on to the property wants to subdivide it someday for the grandkids like that, now is not the right time, no money to buy house. The grandchild lost a job so got to delay, right? So we're talking about developers now but it happens to everyday people where they have to delay their plans and say Planning Department, we promised we'd be building this, we promised we'd be subdividing it for our grandchildren, but you know what, no can right now. So it happens, the economy affects not only hotel developers but everyday people, grandparents... the whole bit yeah so I think you folks have the authority and discretion as does the County Planning Department in certain situations to say yes we revoke your permit or revoke your approval, you haven't given us good enough reason. So I think that's a huge power you folks got, huge power. At the State Land Use Commission, they exercised it on bridge Analea.

Chair Nakamura: Are you done?

Mr. Rapozo: I'm done.

Chair Nakamura: One (1) final question and then I think we're going to adjourn this Committee.

Ms. Yukimura: So the Sandy Beach decision was not a Hawai'i Supreme Court decision was it?

Mr. Arakawa: Circuit Court decision by Judge Makena.

Ms. Yukimura: So you will I presume you have cites from elsewhere that support your thoughts about this percentage of expenditure that you'll provide?

Mr. Arakawa: Yes.

Ms. Yukimura: Okay.

Mr. Arakawa: And again, it's up to you folks. I'll submit the information but I respect Kaua'i County and what you folks decide.

Ms. Yukimura: Okay, thank you.

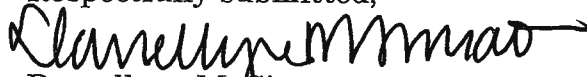
Chair Nakamura: Thank you Mr. Arakawa. Any further public testimony? If not, I would like to thank all of you for coming here, Councilmembers for all of the good questions, and Planning Department for the great presentation, and we'll again take up this matter in two (2) weeks. August 24, 2011 is the next Planning Committee meeting and we'll take it from there.

The meeting was called back to order, and proceeded as follows:

Upon motion duly made by Mr. Rapozo, seconded by Ms. Yukimura, and unanimously carried, Bill No. 2410 was deferred.

There being no further business, the meeting was adjourned at 12:27 p.m.

Respectfully submitted,



Darrellyne M. Simao
Council Services Assistant II

APPROVED at the Committee Meeting held on September 28, 2011:



NADINE K. NAKAMURA
CHAIR, PLANNING COMMITTEE

